Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

FIONA FENG CHEN,

Petitioner,

v.

NORTHWESTERN UNIVERSITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether petitioner *pro se* was deprived of the Seventh Amendment right to jury trial and the Fourteenth Amendment right to equal protection of the law when petitioner filed the case under §1981 and both Courts stated the case was filed under §1981, but the District Court did not consider §1981 statute of limitation, and the Court of Appeals ordered that petitioner *pro se* waived the argument by not having made the argument before the District Court.

2. a) Whether the lower courts failed the *de novo* standard by time barring petitioner, the nonmoving party's, claims and evidence previously accepted by EEOC. EEOC accepted all of petitioner's claims and evidence from 1999 to 2002 and waived the 300-day limit. The lower courts time barred without addressing to EEOC's prior decision. b) Even with time bar, whether the memo dated July 18, 2001, with a required follow-up meeting date of August 1, 2001 in its content, should be evidence inside the July 28, 2001 time-bar period.

3. Whether petitioner was deprived of the Seventh Amendment right to jury trial and the Fourteenth Amendment right to equal protection of the law when the lower courts did not allow petitioner to prove the prima facie case by comparing to the similarly situated employee named by respondent, the employer.

LIST OF PARTIES

The parties are petitioner Fiona Feng Chen and respondent Northwestern University.

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Petitioner Fiona Feng Chen respectfully prays that a writ of *certiorari* issue to review the judgment below.

OPINIONS BELOW

The order of the United States Seventh Circuit Court of Appeals affirming the decision of the United States District Court for the Northern District of Illinois Eastern Division appears at Appendix A, and was unpublished. The judgment of the United States District Court for the Northern District of Illinois appears at Appendix B, and was unpublished. The order of the United States Seventh Circuit Court of Appeals denying petitioner's petition rehearing *en banc* appears at Appendix C, and was unpublished.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Title 28 U.S.C. § 1254, subdivision (1). The decision of a panel of the Court of Appeals was rendered on December 14, 2005. The Court of Appeals denied petitioner's petition of rehearing en banc on January 31, 2006. This petition is timely filed within 90 days of that date.

STATUTORY AND CONSTITUTIONAL PROVISIONS

1. The seventh amendment to the United States Constitution provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, . . ."

2. The Equal Protection Clause of Section 1 of the Fourteenth Amendment provides that no State shall "deny

to any person within its jurisdiction the equal protection of the laws."

3. 42 U.S.C. § 1981(a) states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . . and to the full and equal benefit of all laws and proceedings for the security of person and property. . . .

The pertinent sections of Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act of 1967, and the Americans with Disability Act of 1990 are reproduced in the Appendix D, at 48a – 50a.

STATEMENT OF THE CASE AND FACTS

I. The basis for federal jurisdiction in the court of first instance

Petitioner, Fiona Feng Chen (Chen), invoked the District Court of Northern Illinois, Eastern Division's jurisdiction under 28 U.S.C. §1391(a), 28 U.S.C. §1331 and 1343(a)(3), 42 U.S.C. §2000e-5(f)(3) to assert claims arising under Title VII, 42 U.S.C. §§ 2000e *et seq.*; in addition, under 42 U.S.C. §1988 for claims under 42 U.S.C. § 1981; and under 42 U.S.C. §12117 for claims under 29 U.S.C. §§ 621 – 634 *et. seq.* ("ADEA") and 42 U.S.C. § 12101 *et seq.* ("ADA").

Petitioner invoked the jurisdiction of the Court of Appeals of Seventh District, under 28 U.S.C. §1291:

1) The final judgment of the District Court was dated February 17, 2005.

2) Neither party filed any motion for alteration of judgment.
3) Notice of appeal was filed on March 18, 2005.
4) The appeal was resulted from a final judgment that resolved all claims involving all parties.
5) There had been no prior appellate proceedings in this case.

II. Facts Concerning the Case

Only facts relevant to the questions raised to this Court are stated.

a. Chen's Employment at NU

Petitioner Fiona Feng Chen (Chen) is a former employee, Technical Software Specialist, of Northwestern University (NU) from September 8, 1999 to November 29, 2001[1].[2] Page 11a, Chen Br. 2-3. Chen was born on 6/29/1955, in Taiwan, with race of Asian and country of origin of Pacific

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[1] Chen's official termination was in January 2002 due to the payroll procedure. Pl. Resp., page 4.

[2] The statement refers to the court opinions attached by page numbers such as, 11a, 20a. The Brief submitted to the Court of Appeals for the Seventh Circuit is referred to as Chen Br. Documents submitted before the District Court are referred to as Pl. For example, Plaintiff's Memorandum of Law is referred to as Pl.'s Memo; Plaintiff's LR 56.1(a) Statement of Additional Facts is referred to as Pl.'s Stat; Plaintiff's Response to Defendant's Local Statements is referred to as Pl.'s Resp. Chen's Deposition is referred to as Chen Dep. and Chen's Affidavit is referred to as Chen's Aff. Defendant's documents are referred to as NU. Plaintiff's appendices in the original submission are in Tab 1, 2, 3, etc. and Defendant's appendices are in Tab A, B, C, etc. When it is referred to as Rec., e.g., Rec. #1, it is the number of Records filed with the District Court.

Asian. Chen Memo, page 11. Chen has a Ph.D. with specialties in Information Systems and Computer Applications. Chen Aff., page 9.

Chen went to NU to take courses in Accounting to become a CPA for an expatriate position overseas. Chen interviewed for an Accounting Assistant position with NU's Office of Clinical Research and Training (ORCT) in April 2000. She did not get that position. In August 2000, OCRT asked Chen to interview for another position. Chen Br. 2-3.

Chen's job description and classification were drafted after she was interviewed by the Director of OCRT, Thomas J. Schnitzer, and Associate Director, Sheri Lindsay, and HR consultant, Val Campbell. Chen Br., page 3-4. Chen was classified as non-exempt with an hourly wage, while white, younger employees performed similar job functions on her job description, hired after her, were classified as exempt and paid higher than Chen. Pl.'s Memo, page 13.

Chen attested that during her interviews, other than her appearance of cultural traces and characters and age, there was no other reasonable explanation for NU to give her less favorable terms of employment. Pl.'s Memo, page 4.

Chen was promised of job reclassification on the date of hire, which never came true until Chen's termination. Pl.'s Memo, page 13. Chen's immediate supervisor, Carol J. Nielsen, admitted during discovery that Chen's Information Center task was beyond Chen's job description. Chen Br., page 11. Chen also financially closed out clinical studies, which was also not on her job description. Nielsen used to do this task. Chen Br. 5.

Nielsen noted,

> Dr. Schnitzer wanted someone who could do everything and somewhat conveyed that to Fiona. . . So not fully doing job description – our issue not hers. Possible that Infor Center is beyond job description. . . Is she doing work that is outside the scope of her job description? Should the job description she holds, have more pay? Nielsen Dep., pages 90, 91 – 93; Pl's Stat., page 21; Pl's Memo, page 12.

Nielsen discussed with HR personnel about a comparable pay issue for Chen but did not take any action. Chen stated that she requested for job and pay reclassifications at NU from March 2000 to September 2001 for 17 times. *Id.*, page 12, 13.

NU has never trained its employees employment discrimination laws. Pl's Stat., pages 32, 33, 35.

Schintzer intended to hire Chen to design and implement the entire information system for OCRT. He admitted in deposition during the discovery stage that he did not tell Chen his intension in Chen's job interview. Chen Br., page 3.

Chen sat by the hallway while all white employees, exempt or non-exempt, hired before and after her, had office spaces. Chen Br., page 14. Chen requested for an office space in vain while younger and white employees started with office spaces without ever requesting for them. Chen Br., pages 6, 11.

In June 2000, Nielsen gave Chen her first evaluation. During the Discovery stage, Nielsen provided document and testified that she considered Chen's language a cultural barrier in this evaluation. Pl.'s Stat., page 8. Nielsen told

Chen in June 2000 that Chen did an excellent job but she gave her fours out of five. *Id.*, page 9. Chen asked for an example for a 5. Nielsen did not tell her. *Id.* page 9. Nielsen, however, marked on her own evaluation notes, "partially a culture barrier". Nielsen Dep., pages 77-79. She did not tell Chen about this note. Nielsen Dep., page 79. Nielsen considered Chen's "cultural barrier" is the language issue. *Ib.* pages 79-80. Nielsen said that it was like Chen wrote "nodding, k-n-o-t-t-i-n-g. Someone is nodding rather than n-o-d-d-i-n-g" in email. *Ib.*, page 80.

Chen reported computer and mouse problems since September 1999. Her computer could not hold two programs open at the same time. Chen had to move the mouse for six to seven times in order to click and point. Chen brought in her own mouse to reduce the move to five to six times in order to click and point. Chen Br., pages 4, 5. Nielsen and Schnitzer did not replace the computer nor mouse even after Chen reported physical discomfort caused by the computer on 7/5/2000. Pl.'s Stat, page 28; Pl.'s Memo, page 5. Younger and white employees were provided with computers without problems. Chen Br., pages 6, 11. In August 2000, Chen's hands developed Carpal Tunnel Syndrome. Chen Br., page 8.

Chen reported Worker's Comp. Nielsen was not pleased. She said, "Now they are coming to invest us all." *Id.* On 9/6/2000, Nielsen told Chen, "Fiona, if you cannot do the work, you are of no use to us any more." Pl.'s Resp., page 23. On 9/14/2000, Ray Andre of Risk Management took Chen off for worker's comp. Andre would like to find Chen work elsewhere. Nielsen noted, "Express concern about her working for other depts. For more than 2 weeks at our expense". Pl.'s Res., page 21.

On 11/1/2000, Nielsen noted a discussion with Andre. She wanted Chen to back to her job or fill the position. Pl.'s Stat., page 29. On 11/6/2000, Chen returned to work. Pl.'s Resp., page 22. She was in pain but she followed the doctor's order to work. *Id.*, page 21. On 11/15/2000, Andre told Nielsen it was "Fine with Rey-if Fiona not a help— Okay that she not be here at work after Friday. Hasn't gotten any better" Pl.'s Stat., page 30. Andre closed Chen's case on November 16, 2000. Lindsay sent Chen home without pay on November 17, 2000. Chen worked for 23 days between August 3 and November 17, 2000. Pl.'s Res., page 19.

On 12/4/2000, Matthew Bowers, HR consultant (Miller Dep., page 61), his supervisor, Melissa Durst and Nielsen discussed to let Chen to come in work "even if cannot do job". Chen would be written up every day for disciplinary action and to eliminate Chen's position. Pl.'s Stat., page 30. On 12/5/2000, Nielsen noted for Chen to do regular duties without restrictions. "If she won't do, let Matt know. Will write up/Disciplinay . . . . 3 day no call/can terminate." *Ibid.*

On the same day, Bowers sent Chen a letter to request Chen to apply for FMLA (Family Medical Leave Act) for her "own serious health condition". Pl.'s Res., page 25. Chen was back to work on 12/6/2000 (Chen Aff., page 16) and given a new set of job duties to perform regular computer duties. *Id.*, page 17. Bowers told Chen without FMLA, NU could change her position to part time or cancel the position. Pl.'s Res., page 25. In response to Bowers' request, on 12/20/2000, Chen handed in FMLA application and applied for other positions which may possibly have secretarial assistance. *Ibid.*

On 1/23/2001, Bowers called an ADA meeting with Chicago HR director, Rita Winters, NU EEOC Director,

Michael Powell, Durst, Operations Consultant of the Office of Vice President of Research, Anne McNicholl, Nielsen and Chen. Chen Br., page 10.

During the meeting, Powell said that if necessary, the employee would be removed from her position. Chen in fear, requested in the meeting and in writing that Worker's Comp to be applied and not ADA if it was not ADA. *Ibid.*

Additional ADA meetings were held on 3/8, 3/16, 3/20, and 4/27/2001 with the same NU staff, without Chen. *Id.*, page 11. Powell sent Chen a letter on 3/2/01. He rejected Chen's request for job transfers and notified Chen his decision that she could not perform her job function of data entry. He requested Chen to reply by March 14, 2001. Chen replied on 3/10/2001 to explain that data entry was never her job function. She also reminded Powell of her request for trackball mouse and ergonomically designed keyboard. *Ibid.*

Chen's physician prescribed on 2/13/2001 the trackball mouse and ergonomic designed keyboard for Chen to start working on computer keyboard for half an hour per day. *Id.*, page 10. Nielsen did not respond until 4/16/2001. When she did, she gave Chen that afternoon off to go by taxi to get the equipments. *Id.*, page 11.

During this period, Chen nevertheless helped the Accounting Assistant build several Microsoft Access databases, without Chen ever touching the keyboard. Chen Dep., Ex. 15, pages 1-2. This contemporary memo dated March 10, 2001, from Chen to Powell described in detail Chen's tasks performed at OCRT and her lacking of a valid job description. The document was provided by NU to be authenticated by Chen during her deposition. There is no

record that anyone has ever disagreed with any part of this memo. The District Court judge erroneously regarded the document as a "self-serving" statement. Page 42a.

Schnitzer perceived Chen unable to continue the Information Center project due to Chen's physical condition of pain in her hands and body. Pl.'s Stat., page 23. He assumed that NU had made a decision to approve Chen's disability. He decided to outsource the Information Center project. Chen Br., page 11.

On 5/8/01, Chen's physician prescribed two hours on keyboard and "work 2 hours, then 20-minute break" Pl.'s Res., page 32.

On May 9, 2001, Nielsen and Schnitzer met with Chen. *Id.*, page 33. Schnitzer told Chen, "If you cannot do the work, you should look for another job. Work part-time." Pl.'s, Res., page 34. Nielsen and Schnitzer told Chen that the Information Center is no longer her job. Pl.'s Stat., page 23. They gave Chen a list of "Alternative job duties". Pl.'s Res., page 33, Chen Aff., pages 16-17. They required Chen "to do your job the eight hours with no breaks." Pl.s Res., page 33. Chen requested to be put on the Information Center project team. Nielsen and Schnitzer never replied. Pl.'s Stat., page 24.

NU never accommodated Chen physician's prescription, including the 20 minutes break time. Pl.s Res., page 34. Nielsen testified there were no 20 minute breaks unless Chen went to FMLA. Neilsen Dep., page 152.

On May 24, 2001, Lindsay and Nielsen gave Chen a memo (Chen Dep., B-Ex 19) to inform her Lindsay would become one of Chen's supervisors. Even if the information

center was outsourced, Chen was still responsible for developing and maintaining the department's databases. Chen's "personal medical condition is a private matter" and between Chen and her physician; (*Id.*, page NU00163).

Nielsen and Lindsay gave Chen a new job description with Chen classified as "non-exempt – Preferred by department". Pl.'s Stat., page 7. Guy Miller, Associate Vice President of Human Resources, during discovery, testified the phrase was irregular and occasionally seen at NU. The phrase is for the department to suggest the grade to the HR Compensation Division. Chen Br., page 4.

The May 24, 2001 memo also stated Chen had inappropriate behaviors for providing reports to Manager Lea Elder without correcting the dataset. Pl.'s Res., page 38. Chen asked Nielsen why she did not provide Chen direction on this project when Chen inquired of her. Nielsen replied because they had already decided to write Chen up in a memo. Chen Dep., B-Ex. 25, page NU00178.

For the new job description, Chen requested for job and pay reclassifications. Nielsen and Lindsay refused to consider. Pl.'s Stat., page 26.

By the end of May 2001, Chen turned suicidal. Her physician referred her to psychological counseling. Chen Dep., page 157; Chen Aff., page 23.

From May to August 2001, Chen went to HR to request for her alternatives to relief pain. Twice, Bowers asked her to fill out FMLA then rejected her applications because she had a work-related injury. Chen Aff., page 31. He then referred her to Andre who never reduced her working hours. *Ibid.* NU never accommodated any part of

Chen physician's prescription, including the 20 minutes break time. *Id.*, page 13. Chen summarized that NU rejected her accommodation requests for 28 times, from May 2001 to November 2001. Pl.'s Stat., page 29.

On July 3, 2001, Lindsay called Chen into her office to require Chen to redo the project for Elder which was the subject of the May 24, 2001 memo. Lindsay addressed Chen as "young lady" instead of by Chen's name. Pl.'s Stat., page 3. Chen asked Lindsay to talk with Elder to postpone the project deadline. Lindsay refused. Chen knelt to show sincerity. Lindsay still refused. Chen realized that it was Lindsay and not Elder wanted the project done. She stood up. Chen Dep., page 154.

On July 19, 2001, Lindsay delivered Chen a warning memo dated July 18, 2001. Chen Dep., page 152; Rec. #1, Complaint Filed with the District Court, Attachment. Lindsay considered Chen's kneeling on July 3 inappropriate and threatened Chen with termination of employment. *Ibid.* Chen explained that kneeling in the Asian, Chinese, and Japanese cultures meant sincerity. Lindsay said that she understood kneeling in those culture meant sincerity. Pointing to where she sat, Lindsay said, "But here, it is not acceptable." She further explained, "Here is the American culture". Chen Aff., page 23.

Powell in his response to EEOC's inquiry verified in writing that Chen received the July 18, 2001 disciplinary letter because her kneeling behavior was not accepted in the American culture. Pl.'s Stat., page 2. The July 18, 2001 memo also stated Chen used email excessively. Chen counted she sent 9 emails in 9 days. Pl.'s Res., page 40.

This memo ended by saying "We will meet in 2 weeks, August 1, 2001, to review your progress and performance." Rec. #1, attachment; Chen Dep., Tab "B-Ex 27", page 2.

Lindsay (black, 37) previously, occasionally addressed Chen as "young lady". Chen had never heard her calling others as such. Chen felt uncomfortable but did not confront her. Pl.'s Stat., page 2. On July 19, after receiving the memo, Chen reminded Lindsay that she called Chen "young lady" on July 3. Chen also reported the young lady remark on her August 13, 2001 memo. Lindsay called Chen "young lady" still on 10/8/2001 and 11/19/2001. Pl.'s Stat., page 3.

The July 18, 2001 memo made Chen realize she had been discriminated. Chen Aff., page 23.

On August 13, 2001, Chen reported to NU in a memo dated August 12, 2001 about her being discriminated and harassed for her race, country of origin, age, and disability. The memo was addressed to Miller and Schnitzer and CC. to Bowers, Durst, Lindsay, McGuire, Nielsen, Powell, and Winters. Schnitzer Dep., Tab "14", page 1. This memo was also attached to Chen's complaint filed with the District Court. Rec. #1, attachment.

No one responded to Chen's discrimination complaint. Chen Aff., page 25. Schnitzer admitted that he knew about issues reported in Chen's memo as on going. Schnitzer Dep., page 115; Pl.'s Stat., page 4. All people received the memo discussed about it. Nielsen Dep., page 184. Miller admitted that Chen reported things which had transpired. Miller Dep., page 10; Pl.'s Stat., page 6. Miller admitted that NU had a discrimination grievance procedure and Chen reported the compliant accordingly. He only talked with Winters briefly and took no other actions. *Ibid.*

The only response Chen obtained was from NU's Associate Counsel, Stephanie Graham. Graham contacted Chen's worker's comp lawyer and wanted to know how much Chen wanted for her case. Chen's lawyer replied on September 12, 2001. Pl.'s Stat., page 40; Chen Aff., page 31. Ever since then, management's harassment actions ceased at OCRT. Chen waited for a response from Graham. *Ibid.*

On 9/25/01, Bowers and Schnitzer met and decided to alter the Program Assistant position description to offer to Chen for layoff. Pl.'s Stat., page 31. The meeting note stated, "PA-would not qualify b/c phone skills, 1000 pieces mailing per day at times; could not complete; computer scheduling – constant keyboard activity". *Ibid.* Peri Todd (white, 36) (Todd Dep., page 4) modified the job description accordingly in November 2001. *Id.*, pages 57, 63. Graham's name showed up on Bower's notes for meeting with Schnitzer on 10/25/2001. Pl.s Stat., page 36.

On November 13, 2001, Lindsay notified Chen with a letter to tell her that her position is being eliminated. Pl.'s Memo., page 7. An alternate position of Program Assistant 1 was offered to Chen with the same pay. Pl.'s Res., pages 45-46. Another employee, Program Assistant Kimberly Crockett, (black, 27) was also notified of position elimination. Pl.'s Res., page 44.

On 11/19/2001, Chen accepted the Program Assistant position with her physicians' work limits of maximum three hours per day for computer use and envelope stuffing. Chen Dep., B-Ex 34. On 11/27/2001, Lindsay wrote another letter to tell Chen because she could not perform the essential job

functions of the Program Assistant position, she would be laid off as of 11/29/2001.

There was another Program Assistant position at OCRT whose job description contained no computer use. Pl.'s Stat., page 38. There were other positions in OCRT Chen had seniority. NU did not offer them to Chen. *Ibid.*

Kimberly Crockett was not really laid off. She did not lose one day of pay. Pl.'s Memo., page 9.

In March 2002, Chen learned Rosa Marjalaakso, the Research Financial Analyst of OCRT, planned to leave NU. She waited for the job opening. Chen Aff., page 25. Nielsen paid an employment agency $8,000 to recruit the new Research Financial Analyst (white, 25) with wage of 38,000. Nielsen Dep., page 204; Pl.'s Stat., page 38. Chen never saw the job opening on the website. Chen Aff., page 25. Chen never had a chance to apply for the position. Pl.'s Resp., pages 51, 52; Chen Dep., page 226. Similar to the prior two openings in 2000 and 2001, for the position of Research Financial Analyst position, Chen did not have an opportunity to apply. She was prevented from knowing gthe position opening and recruitment. *Ib.,* page 233. In February 2001, John Sikora, the prior Research Financial Analyst, was promoted. Sikora Dep., page 7. After he was promoted, he participated to recruit the next Research Financial Analyst. *Id.*, page 79. He did not let anyone in the Budget Division or OCRT know his promotion before the position was filled. *Id.*, pages 80, 81; Chen Br. Page10.

b. Chen's Case to EEOC and the Courts

Chen retained an attorney to contact NU in November 2001. Chen Aff., page 32. NU invited Chen to file with

EEOC for the mediation procedures. The attorney drafted a brief version and they filed on 12/26/2001. *Ibid.;* Pl.'s Res., page 62. After the case was filed, NU refused to participate. Chen continued on her own and filed with EEOC a complete complaint on 5/24/2001. Chen filed this complaint prior to the EEOC Notice of Right to Sue letter issued on 7/25/2002 for her 12/26/2001 claim filed.

EEOC accepted all of Chen's charges as filed because of a pattern of continued behaviors. Chen Aff., page 32. EEOC Charge of Discrimination cover page shows "Date Discrimination Took Place" as from the earliest date of 10/1/1999 to the most recent date of 3/30/2002; and "The Particulars Are" as "See Attachment", which is Chen's written statement and attachments. Chen Br., pages 16, 18-19. Chen reported unfavorable employment terms and conditions of job classification, grade, salary, work space, computer use, denied disability accommodations, and unfavorable treatments to other Pacific Asian employees. Pl.'s Resp., page 63.

The EEOC investigator, Janel McCollum-Smith, obtained her supervisor's approval to admit and allow all of Chen's complaints and evidence as filed, including the part on other Asians. The 300-day limit was waived. *Ibid.*

EEOC's Notice of Charge of Discrimination sent to NU also marked date of alleged violation, earliest 10/01/1999 to most recent 3/30/2002. Pl.'s Opposition to to Defendant's Motion of Summary Judgment, page 2; Rec.#1, Attachment; Chen App., Tab "47", page 1; Tab "52", Declaration of Fiona Feng Chen, p., 3. 1).

On 4/5/2003, Chen received EEOC's Notice of Right to Sue for the 5/24/2002 charge. Chen filed complaint as *pro*

se with the District Court for Northern Illinois, Eastern Division, on 6/9/2003. The entire EEOC complaint was attached. Rec. #1. Chen used the standard form provided by the District Court to check the boxes as available. All the choices on the form were for discrete violations. Chen attached a five-page, typed complaint details. Rec. #1. Chen emphasized that her complaint included all these employment terms, conditions, and discharge. Pl.'s Opp., page 1. Chen alleged NU discriminated against her race, age, country of origin, and disability and retaliated against her for reporting discrimination.

Upon the end of discovery, NU moved for summary judgment on June 10, 2004. Among others, NU compared Chen to Kim Crockett as follows.

In November 2001, Chen and Crockett were informed that their positions were being eliminated. . . Crockett is an African-American, non-disabled woman who was 27 years old in November 2001. NU 56.1(a) Statement of Uncontested Facts, page 21.

NU delivered to Chen *Notice to Pro Se Litigant Opposing Motion for Summary Judgment* with an instruction:

> In order to defeat the defendant's request, you need to do one of two things: you need to show that there is a dispute about important facts and a trial is needed to decide what the actual facts are *or* you need to explain why the defendant is wrong about what the law is. (Italic added) Rec. #41. Chen Br., page 29.

Chen filed response on August 19, 2004.

The District Court granted summary judgment for NU on February 17, 2005. Page 45a. Its key decisions pertaining to the petition to this Court are:

1) The District Court acknowledged that Chen brought the case under § 1981 (pages 27a, 34a), but it did not apply the four-year Statute of Limitation.

2) a) The District Court time barred Chen's claims and evidence for the 300-day limit to July 28, 2001. Pages 28a, 29a. The District Court did not address to the fact that EEOC had previously accepted all of Chen's claims and evidence and waived the 300-day limit. b) Chen's direct evidence of the July 18, 2001 memo from Lindsay for Chen's behavior acceptable in the Asian culture but unacceptable in the American culture was acknowledged in the Fact section (pages 17a, 18a). It was, however, not included in the Analysis section as evidence.

3) The District Court considered Chen failed to establish the prima facie case in the indirect method because the District Court considered Chen should provide another employee with the Technical Software Specialist position in the racial discrimination claim (Page 32a) and any other employee complaining of discriminatory treatment in the retaliation claim (page 36a).

The Court did so in spite of its own writing that,

> In November 2001, Lindsay consulted with Bowers on letters to Chen and another employee, informing them that their positions were being eliminated. . . The other employee was a 27-year-old, non-disabled, African-American woman. Page 18a.

Chen appealed to the Court of Appeals of Seventh Circuits on May 20, 2005. The following arguments pertinent to this Petition:

1) Section 1981 claims are with four-year SOL. *Jones v. R.R. Donnelley,* 124 S.Ct. 1836 (2004). Chen Br., page 18. The District Court acknowledged that Chen filed discrimination claims under § 1981. Chen filed her claims on June 9, 2003. The SOL date should be June 9, 1999. *Id.*, page 20.

2) The District Court erred in reversing EEOC's prior decision and failed the summary judgment standard. *Id.*, pages 18 -19. The July 18, 2001 memo is important to both Chen's racial and age discrimination claims (*Id.*, pages 13, 14, 21).

3) In terms of other similarly situated employees, NU did not really lay-off Crockett. Chen was the only employee targeted for termination. Chen made her prima facie case. *Id.*, page 25.

The Court of Appeals decided on December 14, 2005 as follows.

1) The Court of Appeals acknowledged that Chen brought the case under §1981. Page 2a. But it did not apply §1981 SOL. It agreed with the lower court to time bar Chen's evidences to July 28, 2001. Pages 4a, 5a. For Chen's other arguments including §1981 SOL, it stated,

> As for Chen's other arguments that the district court improperly refused to consider events outside the 300-day filing period, she waived these arguments by

not raising them before the district court. See *Bishop v. Gainer*, 272 F.3d 1009, 1015 (7th Cir. 2001). Page 7a.

2) The Court of Appeals did not address to whether the lower court failed summary judgment standard by reversing EEOC's decision. Pages 6a, 7a.

3) The Court of Appeals ignored the arguments between petitioner and respondent, both comparing Chen with another similarly situated employee, Crockett. The Court of Appeals regarded the similarly situation employee to be another Technical Software Specialist. Page 5a.

Chen petitioned for rehearing *en banc* on January 20, 2006 which was denied on January 31, 2006.

REASONS FOR GRANTING THE PETITION

1. CERTIORARI SHOULD BE GRANTED BECAUSE THE UNITED STATES COURT OF APPEALS OF SEVENTH CIRCUIT HAS ENTERED A — DECISION TO REQUIRE A PLAINTIFF PRO SE TO MAKE §1981 LAW ARGUMENT IN ADDITION TO BRINGING SUE UNDER §1981 TO QUALIFY FOR THE PROTECTION OF THE LAW. THIS REQUIREMENT IS CONFLICT TO A RELEVANT DECISION OF THIS COURT AND IN CONFLICT WITH THE DECISION MADE IN LOWER COURT OF ANOTHER CIRCUIT.

Any plaintiff pro se' right to §1981 when bringing pleads under §1981 should be protected, with or without additional law arguments. The seventh amendment to the United States Constitution provides: "In suits at common law, where the value in controversy shall exceed twenty

dollars, the right of trial by jury shall be preserved, . . ." The Equal Protection Clause of Section 1 of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

In *Douglas B. Stephens v. Hofstra University School of Law,* 2005 WL 1505601 (E.D.N.Y.), Plaintiff *Pro Se* brought the employment discrimination sue against his former employer to the United States District Court of E.D. New York. The Court granted him §1981 Statute of Limitation of three years, *Stephens* at 5, without any law arguments on his part. Stephens made the §1981 claim in his second amended complaint. *Ib.*, at 2. The Court stated that,

> " . . . a court must construe pro se complains like Stephens's even more liberally, applying a more flexible standard to evaluate their sufficiency than the standard used to review complaints submitted by attorneys." Citing *Lerman v. Bd of Elections in City of New York,* 232 F.3d 135, 140 (2d Cir. 2000). *Stephens* at 3.

The Court also stated,

> "A district court should not grant a motion to dismiss solely because the plaintiff fails to respond to it (or responds to it inadequately, for that matter). . . Although a plaintiff is entitled to submit papers in opposition to a . . . motion, he may also simply rely on his pleading, where those pleading are legally sufficient. . ." *Ib.*, at 3.

Should petitioner *pro se* have resided in E.D.N.Y., she would have been granted the §1981 SOL.

42 U.S.C. § 1981(a) states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . . and to the full and equal benefit of all laws and proceedings for the security of person and property.

The decision made by the United States Court of Appeals for the Seventh Circuit violated petitioner's rights to §1981.

In *Jones et al. v. R.R. Donnelley & Son Company,* 305 F.3d 717, the Court of Appeals of the Seventh Circuit held that four-year SOL applied only to initial contract formation and all employment actions after formation should be subject to two-year SOL. Plaintiffs appealed to the Supreme Court. In *Jones et al.,* 541 U.S. 369, 124 S.Ct. 1836, the Supreme Court held that "1) causes of action is governed by federal "catch-all" four-year statute of limitation if the claim was made possible by a post-1990 enactment. . .", and 2) employees' claims after contract formation were also governed by "catch-all", four-year SOL period.

The instruction NU gave to Chen *pro se* was "evidence or law". It did not state that if the law argument was not raised at the district court, Chen was waiving the argument.

The District Court for Northern Illinois District Eastern Division admitted that petitioner brought the case under §1981. Pages 27a, 34a. However, it did not apply §1981 SOL to Chen's case. Chen brought the issue to the Court of Appeal. The panel also acknowledged that Chen brought the case under §1981. Page 2a. But it stated that ". . . she waived these arguments by not raising them before the district court." The panel cited *Bishop v. Gainer,* 272 F.3d

1009, 1015 (7th Cir. 2001) to disallow Chen's other arguments on time bar. *Id.*

In *Bishop v. Gainer*, Meyers' SOL was waived because at trial he made the statement that defense did not raise SOL issue to him and he had not offered any hint of what evidence he would have used to establish equitable tolling. 272 F.3d 1009, 1015, (7th Cir. 2001).

Chen's situation is different from that of Meyers'. Chen filed her claim under §1981. She presented through deposition and exchanged documents with NU, evidence to verify her claims. For example, first, Schnitzer, OCRT Director, and Lindsay drafted her job description after interviewing Chen. Chen was classified as non-exempt. There was a phrase of "preferred by department" behind this classification, which was disguised from Chen in 1999. The same phrase showed up in Chen's second job description given on May 24, 2001. University Associate Vice President, Miller testified during deposition, that the phrase is irregular and occasionally seen at the University for the department to suggest the grade to HR Compensation Division. Pl.'s Memo, page 4. Schnitzer admitted that he did not see anyone else at OCRT with such phrase. Pl.'s App., Tab "1", Schnitzer Dep., pages 64-65.

Second, Schnitzer and Lindsay altered Project Coordinator 2 job description to create Chen's job description. They are mostly identical except for the non-exempt classification. Pl.'s Stat., Rec. #62, page 20.

Third, Schnitzer hired Chen to do the information center project without telling Chen during the interview. Pl.'s Memo, page. 13.

Fourth, Nielsen admitted that the information center project was beyond Chen's job description. Pl.'s Memo., page 12.

Chen testified that she was give five different job duties and descriptions from 9/8/1999 to 11/29/2001. She requested for job and pay reclassifications from March 2000 to September 2001 for 17 times. None of her requests were granted. Pl.'s Memo, page 13; Pl.'s Stat., pages 25-27.

The petition should be granted so that *pro se's* right to §1981 can be protected and the Seventh Circuit can be in uniformity with the decisions of this Court and the court of other circuit.

2. CERTIORARI SHOULD BE GRANTED BECAUSE THERE IS NO PRECEDENCE FOR A DISTRICT COURT TO REVERSE EEOC'S PRIOR DECISION TO FAVOR THE MOVANT AND MEET THE SUMMARY JUDGMENT STANDARD. EVEN IF THERE IS A 300-DAY LIMIT, THERE IS NO PRECEDENCE FOUND TO EXCLUDE THE JULY 18, 2001 MEMO WHICH HAD AN ENDING MEETING REQUIREMENT ON AUGUST 1, 2001, WITHIN THE JULY 28, 2001 LIMIT. THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Jenkins v. Blue Cross Mutual hospital Insurance, Inc. was the landmark decision in the Seventh Circuit to allow "likely or reasonable" charges to grow out of an EEOC investigation. 538 F.2d 164, 167 (7th Cir. 1976) (*en banc*).

Similar court cases are found favoring the non-moving party to have claims grow out of EEOC charges. See *Nelson S. Jenkins v. Wal-Mart Stores, Inc.*, 910 F.Supp. 1399; N.D. Iowa, Central Division, Nov. 26, 1995; *Ibnomer M. Sharafeldin v. State of Maryland, Department of Public Safety and Correctional Services*, 94 F.Supp.2d 680, D. Maryland, April 10, 2000; and *Myrtle Thomas v. Eastman Kodak Company*, 183 F.3d 38, United States Court of Appeals, First Circuit, July 15, 1999.

We cannot find any precedence for district and circuit courts to disallow plaintiff's claims and evidence previously accepted by EEOC. By reversing EEOC's decision to Chen's disadvantage, the district court should have failed the Summary Judgment standard and the panel failed the *de vono* review standard. The standard requires the court to resolve all conflicts in favor of the non-moving party, petitioner, and draw all reasonable inferences in favor of that party. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000); *Tuokey v. Chicago Park District*, 148 F.3d 735, 740 (7th Cir. 1998).

To defeat the Summary Judgment, Chen presented the fact and document that EEOC accepted all her claimed as filed back to October 1, 1999. They was presented in her Affidavit (Chen App., Tab "14", page 32); Response to NU's 56.1(a) Statement (Pl.'s Resp., Rec. #60, page 63); Plaintiff's Opposition to Defendant's Motion of Summary Judgment (Pl.'s Opp., Rec. #61, page 2-3); and Memorandum of Law (Pl.'s Memo, page 14).

Even if time barred for 300 days, the memo from Lindsay dated 7/18/2001 had an ending meeting date of August 1, 2001 (Chen Dep., Tab "B-Ex 27", page 2) and should have been included as a direct evidence.

3. CERTIORARI SHOULD BE GRANTED BECAUSE THERE IS NO PRECEDENCE FOUND FOR THE COURTS TO DISALLOW THE EMPLOYEE TO COMPARE TO THE SIMILARLY SITUATED EMPLOYEE CHOSEN BY THE EMPLOYER. THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Ever since the Motion for Summary Judgment, NU has been comparing Kim Crockett to Chen as a similarly situated employee. NU Stat., page 21. Chen has made the comparison and proved that Crockett was not really laid off. NU retained her by transferring her to a different department. Pl.'s Memo, page 9. Chen was the only one targeted for termination. Chen Br., page 25.

NU in its Response to Plaintiff's Second Set of Interrogatories stated,

> Northwestern states that Kim Crockett did not lose any days of pay as a result of her layoff in 2001 nor did she receive any unemployment insurance payments. Ms. Crockett's last day of employment in OCRT was November 29, 2001, the day on which her position was eliminated. She received two weeks of severance pay, and she started working in ORSP on December 17, 2001. Pl.'s App., Tab "43", page 2.

Chen concluded in appeal by using NU's court case of *Rozskowiak v. Village of Arlington Heights*,

> Unlike Rozskowiak who was unable to produce evidence that non-Polish officers who performed similar to him were retained . . ., Chen is able to establish her prima facie case by producing evidence that a similarly-situated employee, both with positions eliminated, outside of her protected classes of was treated better, retained. Kim Crockett was a 27-year-old, non-disabled, African-American woman . . . who was not in Chen's protected classes . . . There is no record Crockett ever filed a discrimination complaint against NU. Chen established the prima facie case for all her claims of race, age, country of origin, disability, and retaliation. Chen Rep., pages 2, 3.

A research of court cases did not yield any precedents in which that the Court ignored the similarly situation employee chosen by the employer. Petitioner employee should be able to be compared with the similarly situated employee chosen by the employer.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Fiona Feng Chen
Petitioner Pro Se
11840 Covey Ln
Huntley, IL 60142
847-659-1989
Date: May 1, 2006

APPENDIX

APPENDIX A – JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, CHICAGO, ILLINOIS DECIDED DECEMBER 14, 2005

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT CHICAGO, ILLINOIS 60604

Submitted December 13, 2005*
Decided December 14, 2005

No. 05-1744

D.C. No. 03-C-3928
Northern District of Illinois, Eastern Division

FIONA FENG CHEN,

Petitioner,

v.

NORTHWESTERN UNIVERSITY,

Respondent.

Before

Hon. Richard A. Posner, Circuit Judge

Hon. Ann Claire Williams, Circuit Judge

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* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. See Fed. R. App. P. 34(a)(2).

Hon. Diane Sykes, Circuit Judge

ORDER

Fiona Chen sued her former employer, Northwestern University, for race and national origin discrimination in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § § 2000 et seq.; age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. § § 621 et seq.; and disability discrimination and failure to accommodate a disability under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. She alleged that she was discriminated against when Northwestern failed to accommodate her disability, failed to promote her, and ultimately terminated her. The district court granted summary judgment for the defendants, and we affirm.

Chen is a native of Taiwan. In 1999, when she was 44 years old, she interviewed for an assistant accounting position in Northwestern's Office of Clinical Research and Training ("OCRT"). Though she was not hired for that position, OCRT hired her later that year as a "Technical Software Specialist," a unique position specifically created for her. This job required significant computer use, and within a year Chen began to complain of arm and wrist pain. In December 2000 and January 2001 Northwestern denied her requests for accommodation that included assistance from a secretary or a transfer to a position with secretarial support. But Northwestern allowed her intermittent leave and modified her duties so that less time was spent on the computer. By April 2001 Northwestern could no longer assign modified work because none was available. Chen returned to her computer-related assignments, and Northwestern provided her with an ergonomic keyboard

recommended by her doctors and granted her intermittent leave under the Family and Medical Leave Act so that she could take periodic 20-minute breaks.

In August 2001 Northwestern re-organized OCRT, cutting its budget and eliminating three staff positions including Chen's. Nobody was hired to replace her. Pursuant to Northwestern's seniority system for layoffs, Chen was offered a less-senior position without a pay cut; the position required substantial clerical and computer work. Chen conditionally accepted, provided that she not be required to work more than three hours per day on the computer, but because this would prevent her from performing the essential functions of the job, Northwestern declined her conditional acceptance and she was laid off in November 2001.

Chen filed charges with the EEOC in December 2001 but she did not file suit within 90 days of receiving her right-to-sue letter. In May 2002 she again filed charges with the EEOC, and this time she timely sued in the district court, alleging Northwestern discriminated against her on the basis of race, national origin, age, disability, and retaliation, by terminating her employment, failing to promote her to a financial analyst position, and failing to accommodate her requests for limited computer-related duties.

The district court, in a thorough 38-page decision, granted Northwestern's motion for summary judgment. First, the district court found that all allegedly discriminatory acts occurring before July 28, 2001 (300 days before her EEOC filing on May 24, 2002) were time-barred, and that she could not show a continuing violation because she did not provide evidence that Northwestern's actions were sufficiently frequent or related. The court found that Chen failed to establish a prima facie case of

wrongful termination or retaliation because she introduced no evidence suggesting that she was treated differently than similarly situated employees. The district court also rejected her failure-to-hire and failure-to-promote claims because Chen did not present evidence that she was qualified or even applied for the financial analyst position at issue. Finally the court granted summary judgment on Chen's failure-to-accommodate and disability claim because she did not show that she could perform the essential functions of the job with or without a reasonable accommodation.

Chen's discursive brief on appeal raises twenty-two arguments attacking the district court's reasons for granting summary judgment against her, but none of these arguments require us to reverse the district court's well-reasoned decision. For instance, she generally challenges the district court's determination that her discrimination claims based on events occurring prior to July 28, 2001 were time-barred. As the district court properly explained, however, claims under Title VII, ADEA, and the ADA must be brought within 300 days of the alleged unlawful employment practice, *Stepney v. Naperville Sch. Dist.*, 392 F.3d 236, 239 (7th Cir.2004); *Flannery v. Recording Indus. Ass'n. of America*, 354 F.3d 632, 637 (7th Cir.2004), and here the district court properly refused to consider events that occurred outside the 300 day period prior to her May 2002 EEOC filing. Chen argues that the district court should have considered claims based on her December 2001 EEOC filing, but she waived those claims because she did not bring suit within 90 days of receiving that right-to-sue letter. *See Dandy v. United Parcel Serv., Inc.*, 388 F.3d 263, 270 (7th Cir.2004). The district court also correctly found that the allegedly discriminatory actions were not sufficiently frequent or related to her termination to constitute a continuing violation. *See Tinner v. United Ins. Co. of America*, 308 F.3d 697, 708 (7th Cir.2002). As for Chen's

other arguments that the district court improperly refused to consider events outside the 300-day filing period, she waived these arguments by not raising them before the district court. *See Bishop v. Gainer*, 272 F.3d 1009, 1015 (7th Cir.2001).

Most of Chen's remaining arguments appear to contend that the district court failed to address certain claims or evidence. But the district court thoughtfully addressed all of Chen's discrimination theories, and Chen has not explained how any particular evidence overlooked by the court raised disputed issues of material fact.

Finally, Chen asserts with little elaboration that the district court erred in finding that she had not established a prima facie case of discrimination under the indirect method of proof; she contends that the court wrongly classified her position as "unique" and found no other employees similarly situated. Indeed, to prove a prima facie case of discrimination, the plaintiff must demonstrate that other similarly situated employees who were not members of the protected class were treated more favorably. *See Michas v. Health Cost Controls of Illinois*, 209 F.3d 687, 693 (7th Cir.2000). Here Chen has not pointed to any evidence in the record to disturb the district court's finding that OCRT has never hired anyone other than Chen for a comparable "software specialist" position. Even if Chen had characterized Northwestern's restructuring as a mini-reduction-in-force, in which her position was not permanently eliminated but instead her work load was assumed by others, she would have needed to prove that her duties were absorbed by employees who were not members of her protected class, *see id.* But she did not raise this theory or meet this burden of proof.

AFFIRMED.

APPENDIX B – JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION DATED FEBRUARY 17, 2005

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

CASE NO. 03 C 3928

FIONA FENG CHEN,

Petitioner,

v.

NORTHWESTERN UNIVERSITY,

Respondent.

HONORABLE DAVID H. COAR

MEMORANDUM OPINION AND ORDER

Before this Court is defendant Northwestern University's ("Defendant" or "Northwestern") motion for summary judgment against plaintiff Fiona Feng Chen ("Plaintiff" or "Chen"). For the reasons set forth below, defendant's motion is granted.

I. FACTS

In the spring of 1999, plaintiff Fiona Feng Chen interviewed for an accounting assistant position in Northwestern University's Office of Clinical Research and

Training ("OCRT").[1] The OCRT runs clinical studies for Northwestern University clinical investigators, some of whom conduct research for pharmaceutical companies; OCRT administers budget for such studies. Chen was not hired for the accounting assistant position. Chen was 44 years old at that time. Chen is of Chinese and Southeast

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[1] Unless otherwise noted, the facts in this section are taken from the parties' Local Rule 56.1 Statements of Undisputed Facts. Chen's Local Rule 56.1(b) response to Defendant's Statement of Undisputed Facts and her Statement of Additional Facts both contained numerous violations of the requirements of the local rule. In addition, Chen submitted exhibits that fall outside the scope of acceptable materials in support of summary judgment briefs. For example, Chen filed a four-volume document entitled "Appendix to Plaintiff's LR 56.1 Statement of Additional Facts in Support of Its Opposition to Defendant's Motion for Summary Judgment and Plaintiff's Memorandum in Objection to Defendant's Motion for Summary Judgment and Plaintiff's Response to Defendant's 56.1 Statement of Uncontested Facts." In all, plaintiff has submitted somewhere in the range of 2,000 pages of paper in this case. Many of these submissions fall just inside or beyond the outer ranges of what is permissible under Rule 56. Fed.R.Civ.P. 56. This volume of paper represents a burden on the court and the defendant; and the questionable relevance of many of the documents filed is vexatious. However, in keeping with the standard of making all reasonable inferences in favor of the non-moving party on summary judgment review, this Court will not use its time considering whether or not an individual document should be struck from the record but will instead decide this case on the merits. To the extent that Chen relies on an unauthenticated document, such as notes she created about her medical history or computer complaints, that document will be disregarded. Potentially self-serving documents with no authentication or documents based on events or conversation of which the creator has no personal knowledge are improper evidence. There is no effect on the outcome of the summary judgment decision.

Asian descent and was born and raised in Taiwan.[2] Chen has a Ph.D. in Public Administration from SUNY-Albany, specializing in Policy Analysis and Organization Management.

In August 1999, Chen interviewed with OCRT again. She met with Sheri Lindsay, an Associate Director at OCRT; Dr. Thomas Schnitzer, Director of OCRT; and Val Campbell of Northwestern University Human Resources. Chen was hired into a position created especially for her, Technical Software Specialist, in September 1999. Chen was employed as a Technical Software Specialist from September 1999 until the position was eliminated in November 2001.

When she began working at OCRT, Chen reported to the OCRT Business Manager, Carol J. Nielson.[3] Chen reported to Nielsen until May 24, 2001, when she also began

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[2]Chen, who is representing herself *pro se* in this matter, filed two sets of responses to Defendant's motion for summary judgment. This Court informed her that it would not consider multiple filings. Chen accordingly stated that she would rely on the second filing. Defendant filed a Motion to Strike for significant violations of Local Rule 56.1. That motion remains pending and will be considered separately. Chen then sought leave to file an amended set of response pleadings in an attempt to cure the alleged Local Rule 56.1 deficiencies. This Court granted that leave. Defendant did not seek leave to file a sur-reply. As a result, defendant's reply brief responds to a filing that is no longer properly before this Court. As plaintiff's amended filings sought to cure what were largely procedural defects, the substance of the amended brief does not differ from that of the filing it superseded. Defendant's reply brief, therefore, remains responsive.

[3] The parties dispute the exact title of Carol J. Nielsen's position. Her exact title is irrelevant to the outcome of this motion.

to report to Sheri Lindsay. Both Carol Nielsen and Sheri Lindsay reported directly to Dr. Schnitzer. Chen was assigned to a workstation in an open, hallway work area on the fifth floor of the OCRT offices, close to Nielsen and Lindsay's offices. One other employee, an accounting assistant who reported to Nielsen, worked in the workstation next to Chen's. After she began work, Chen asked to be moved to an office or to some other private workspace. The parties dispute whether there were vacant offices available on the fifth floor when Chen made these requests. Apparently, an office on the fifth floor was temporarily empty on two occasions when the position of Research Financial Analyst was vacant. There were no other offices on the fifth floor that were vacant at any point during Chen's employment in OCRT.

Technical Software Specialist Position

The Technical Software Specialist position involved substantial computer work. Chen's initial job description prepared by the University provided that at least 30% of the Technical Software Specialist duties and responsibilities would involve computer database work, and another 30% would involve providing technical assistance to OCRT staff. The position's job description assigned duties including the design, implementation, and maintenance of various databases; creation of materials and publications to promote OCRT within Northwestern University; provision of technical assistance and support to OCRT staff; and coordination of financial activities to enhance departmental reporting, all of which was largely done on the computer. During her first year in the Technical Software Specialist position, Chen worked as many as 6-8 hours per day on the computer for periods of up to two-and-a-half months at a time.

Chen's Reclassification Requests

The Technical Software Specialist ("TSS") position was classified as non-exempt and grade 12 on the University's grading scale. Northwestern permits an employee, an employee's supervisor, and the department of human resources to request position reclassification. However, reclassification requests normally come from the employee's supervisor. In September 1999, shortly after Chen took the TSS position, Chen and Val Campbell, a Human Resources Consultant with Northwestern, discussed the possibility of reclassifying Chen's position as "exempt" and increasing Chen's salary. The TSS position was not reclassified. Chen renewed her reclassification request to Matthew Bowers, a Consultant in Northwestern's Human Resources Department, in May 2001.[4] The Human Resources department discussed Chen's request at a regularly-scheduled personnel issues meeting, and again determined that Chen's position was properly classified and made no changes.

In July 2001, Chen asked Rita Winters, Director of Human Resources on Northwestern's Chicago campus, about reclassification and a pay raise. Winters asked Karen McGuire, Northwestern's Director of Compensation, to conduct another review of the position to determine whether reclassification was appropriate. McGuire only conducted

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[4] Chen disputes this statement in her L.R. 56.1 Response. A review of the pages from her own affidavit that she cites in support of her opposition to this statement, however, supports the defendant's position. Chen's affidavit states, "When I was given another new job description on May 24, 2001, I though that was a good opportunity to request for a job and pay reclassification. I sent memos and supporting documentation to Matthew Bowers, our consultant at HR at that time." Chen Aff. at 18-19.

five or six reclassification requests for positions moving from non-exempt to exempt during her three years as Director of Compensation.[5] As part of her review, McGuire interviewed Chen for 45-60 minutes in August 2001. McGuire also visited OCRT to review Chen's job duties and met with Sheri Lindsay and Chen about those duties. In addition, McGuire gathered information about fourteen similar positions at Northwestern and prepared a chart listing each position, its grade level, its exempt or non-exempt status, and the salary level assigned. She compared Chen's position and grade level to these other positions, and determined that Chen's position was properly classified. The TSS position therefore continued to be a non-exempt, Grade 12 position.

Chen's Initial Performance at OCRT

During her first year at Northwestern, Chen generally performed well. In her first performance review, which

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[5] Chen disputes this characterization of McGuire's deposition testimony, arguing that McGuire admitted to performing "probably between 30 to 50 reclassifications" from non-exempt to exempt during her *entire* time at Northwestern. According to Plaintiff, McGuire performed all but five or six of these reclassification reviews in the time period of 1994 to 1999, when she was a Senior Compensation Analyst (1994-1997) and a Manager of Staffing and Employee Development (1997-1999). Chen's objection to Defendant's statement of fact is technically true. The "clarification" tends to support Defendant's position over Plaintiff's, however, because it shows that it was more unusual than not for the Director of Compensation to perform a review, rather than one of her subordinates. Such fine-grained quibbling occurs throughout Plaintiff's 56.1 filing. To the extent that Plaintiff's dispute of Defendant's other facts is similarly unhelpful, it will be disregarded.

occurred in June 2000, Nielsen rated Chen's performance as a "4" out of a possible "5." Chen received a 5% pay raise in her first year at Northwestern.

Chen's supervisors noted in Spring 2000 that Chen had some communication problems and counseled her to improve her communication. On March 22, 2000, Chen sent an email to Nielsen and to Lea Elder, the Associate Director of Clinical Research at OCRT, in which she complained of inadequate communication from them, stating that "managers carry certain responsibility, too, you know." Chen closed the email by stating, "I think it is your responsibility to communicate to your subordinates what you are doing. If you fail to do so, take the responsibility for the consequences, and do not blame your subordinate ... Take your own responsibilities, please." Nielsen considered Chen's statements in the March 22, 2000 email regarding managers to be "inappropriate" and testified in her deposition that she informally counseled Chen about them. Chen denies such counseling occurred.

Chen's Medical Condition

In August 2000, Chen reported to Nielsen that her arm and wrist hurt from using her computer, keyboard, and mouse. Chen applied for worker's compensation benefits in August 2000 for a reported injury to her hands. Chen received various worker's compensation benefits between August and November 2000 while several physicians evaluated her medical condition. Chen contends that Northwestern "shopped" for physician's opinions and forced her to come to work when she was unable to do so. In September 2000, Chen informed Nielsen that she was unable to perform any task that required her to use her hands repeatedly, including answering the phone, photocopying, filing, and using writing utensils.

Between August and November 2000, Nielsen modified Chen's work assignments because of Chen's reported inability to perform certain tasks with her hands. During this time period, Chen was intermittently on leave, performed modified job duties, and worked less than eight-hour days. Chen alleges that she was not allowed to work less than eight hour days unless she used sick and annual leave, but acknowledges that there were times she did not attend work for a full eight hours. Chen was not required to perform any computer-related tasks from August 2, 2000 through November 2000. Instead, she attempted to perform other tasks, including doing close-outs; doing spreadsheets by hand; reviewing amendments for budget changes; reviewing access books; going through study binders and completing a checklist to ensure that all items were present; and preparing regulatory binders for regulatory close-outs. Occasionally, Chen's condition prevented her from performing the modified duties assigned, and Northwestern had difficulty finding any tasks that she could perform. Chen reported that she was experiencing pain doing non-computer work in November 2000. When she was at work between August and November 2000, Chen occasionally took breaks at her desk, put her head down, and rested. Nielsen counseled Chen not to sleep at her desk. On November 16, 2000, Reynold André, the Claims Manager for Northwestern's Office of Risk Management, wrote Chen a letter informing her that her workers' compensation benefits for her bilateral hand pain had been terminated. Chen returned to full-time work status in November 2000.

Northwestern did not require Chen to do any computer work between August 2000 and April 26, 2001; Chen estimates that she did zero hours of computer work per day during that time frame. In late April 2001, before Northwestern required Chen to resume work duties

requiring substantial use of a computer and keyboard, Northwestern provided Chen with an ergonomic keyboard. Chen had requested the ergonomic keyboard and a trackball mouse on several occasions prior to April 2001.

Chen's Accommodation Requests

In December 2000 and January 2001, Chen began requesting work accommodations other than relief from computer work, including a transfer to other positions with secretarial support, or a secretary for her current position. On December 20, 2000, Chen sent a letter to Matthew Bowers, in which she wrote, "Under ADA, to facilitate the University to accommodate my disability, I am attaching a copy of my vita for your reference. Some secretarial assistance would be helpful." In addition, Chen submitted applications for two positions in January 2001; one was Associate Director of Academic Programs-CE (Continuing Education); and the other was Associate Director of Academic Programs-CE (Continuing Studies). Both positions required substantial administrative and teaching experience; the positions were responsible for planning, managing and evaluating an academic program plan for university-level credit. Northwestern reviewed Chen's transfer applications, but she was not selected for either position. Matthew Bowers, Northwestern University Human Resources Consultant, stated that Chen did not possess the requisite administrative experience. Chen disputes this fact and asserts that her educational and employment history met the requirements of the job posting.

On January 23, 2001, Northwestern held a meeting to discuss Chen's accommodation requests. Present at that meeting were Chen; Rita Winters; Carol Nielsen; Melissa Durst (Human Resources); Michael Powell, Director of Equal Employment Opportunity, Affirmative Action and

Labor Relations at Northwestern University; and Anne McNicholl, Operations Consultant, Office of the Vice President of Research, Northwestern University. During the meeting, Chen stated that the ADA was inapplicable to her situation and requested that Northwestern not apply the ADA to her.

On January 24, 2001, Chen wrote a letter to Powell in which she cited a decision from the United States District Court of the Northern District of California, holding that an employee's surgically-corrected carpal tunnel syndrome was not a 'disability' within the meaning of the ADA. She then wrote, "[t]herefore, I am not disabled within the meaning of the ADA." Powell determined that the ADA did not apply to Chen because she was not "otherwise qualified" to perform the essential duties of her position, with or without a reasonable accommodation. Chen replied and denied that she had requested any ADA accommodation. In subsequent memos, Chen referred to the ADA as "inapplicable." Although Northwestern and Chen agreed that the ADA did not apply to her situation, Northwestern attempted to find non-computer tasks for Chen to do in order to allow her hands and wrists to improve. Chen never contacted Powell to seek any further accommodation after the January 23, 2001 meeting.

In mid-December 2000, Chen's doctor prescribed that Chen should begin working six hours per day with a twenty minute break every hour, and with no computer keyboard work, effective January 7, 2001. In mid-February, Chen's doctor updated her prescription, stating that she should continue working six hours per day and could begin using an ergonomic keyboard and trackball mouse for thirty minutes per day. At the beginning of March 2001, Chen's doctor prescribed an increase in work hours to eight hours per day with a twenty minute break every hour. On May 8,

2001, Chen's doctor increased her computer keyboard time to two hours per day.

By April 2001, however, OCRT was running out of modified non-computer work for Chen to perform. The computer-related duties of the TSS position that Chen normally would have been assigned were not being completed. In May 2001, Nielsen and Schnitzer consulted with Bowers and determined that they could no longer allow Chen not to perform the computer-related tasks essential to her position. On May 9, 2001, Schnitzer and Nielsen met with Chen and informed her that she would need to perform all of the tasks related to her job, including computer-related tasks, no matter how much time on the computer those tasks required. They further informed her that if she could not fulfill her position duties, she should contact Human Resources to determine her options. However, Northwestern allowed Chen to take twenty minute breaks during May 2001 while waiting for Chen to apply for leave time under the Family and Medical Leave Act to cover her breaks and frequent doctors' visits. Chen resumed the complete duties of her TSS position in May 2001. She estimated that she worked on her computer for an average of six to eight hours every day between May and November 2001.

Chen did not seek a transfer to another position between May and November 2001. Chen never applied for the Financial Research Analyst position at OCRT.

Chen's Performance and Discipline

Shortly after resuming her complete job duties on May 9, 2001, Chen engaged in a series of communications with her managers and co-workers that her supervisors considered inappropriate. On May 9, 2001, Chen sent an email to Nielsen that said, "I have a 'stupid' question. If you

know how to do [a database task], why don't you just do it yourself?" The following day, Chen sent an email to Lea Elder, in which she raised concerns about her work situation and stated that her assignment to clean data in a database was not her responsibility. Bowers and Winters, from Northwestern's HR department, consulted with Nielsen and Schnitzer and helped draft a written reprimand on May 24, 2001, regarding Chen's inappropriate and unprofessional communications. Nielsen and Schnitzer met with Chen on May 24, 2001, to discuss the reprimand.

Chen sent a written complaint to Winters in late May 2001 regarding the May 24, reprimand. Winters investigated the complaint by interviewing Chen and several OCRT employees involved in the underlying situation. Winters concluded that Chen had been treated fairly; she sent Chen a memorandum reporting her findings on July 9, 2001.

Chen received her annual performance review on June 27, 2001. She received an overall performance rating of "3" out of "5," which meant that she was "meet [ing] expectations." The review noted Chen's strengths, but also highlighted areas that needed improvement, including interpersonal communication, team-building skills, and interpretation of conversation and written information. Chen received a 3.5% pay raise in 2001.

In July 2001, Lindsay, in consultation with Matthew Bowers of HR, wrote Chen a formal disciplinary memo for inappropriate conduct involving a supervisor and for excessive and redundant use of email. On July 3, 2001, Chen asked Lindsay for a change in one of her work assignments. When Lindsay refused, Chen begged her to change the assignment and, eventually, knelt on the floor of Lindsay's office and begged again. Lindsay demanded that Chen stand up and informed her that such conduct was

unprofessional. Chen stated that kneeling was a way of demonstrating sincerity in certain Asian cultures; Lindsay responded that although she understood Chen's explanation, in American culture kneeling was inappropriate.

Elimination of Chen's Position

In mid-2001, Northwestern decided to move OCRT from reporting to the university's Vice President of Research to the Medical School. In late October, Dr. Robert Rosa, the Executive Associate Dean for Clinical Affairs at the Medical School wrote to Schnitzer, OCRT's director, instructing him "to decrease the projected expenses of the OCRT ... by approximately $200,000." Rosa explained that the decrease was required based on projected revenue estimates for OCRT. During Fall 2001, Schnitzer met with Bowers to discuss personnel reductions in OCRT in light of the budgetary constraint. Schnitzer and his management team decided to eliminate three support-staff positions that did not provide services directly to principal clinical investigators, including the Technical Software Specialist position. Chen asserts that Bowers directed members of the OCRT management to update the Program Assistant I position description, adding additional computer and mail preparation duties that required use of an employee's hands and wrists.

In November 2001, Lindsay consulted with Bowers on letters to Chen and another employee, informing them that their positions were being eliminated for budgetary reasons. The other employee was a 27-year-old, non-disabled, African-American woman. The employee in the third position had already decided to leave the university when her position was eliminated; she was simply not replaced. Northwestern has a "bumping rights" policy, under which a displaced senior employee may displace a lower-graded

employee within the same unit. Northwestern offered Chen to opportunity to "bump" a Program Assistant 1 employee in OCRT, a position that required a substantial amount of computer work. The Program Assistant 1 position was a lower pay-grade, but Northwestern offered to continue paying Chen at her former pay grade. Chen responded on November 19, 2001, by accepting the position on the condition that Northwestern allow her to limit her computer work to no more than three hours per day and permit her to follow other restrictions noted by her doctors. Lindsay consulted with the Human Resources department, which determined that computer work beyond three hours per day was an essential component of the Program Assistant 1 position. On November 27, 2001, Lindsay prepared a letter to Chen, explaining that Chen's work restrictions prevented her from performing the essential functions of the Program Assistant 1 position and that she was, therefore, terminated, effective November 29, 2001. OCRT has not had a Technical Software Specialist position since that time.

Between December 2001 and May 2002, Chen applied for five different open positions at Northwestern. Each application was processed according to Northwestern's practice, and Chen was not selected for any of the positions. None of the positions that Chen applied for during this time was in OCRT, and none of Chen's former supervisors in OCRT had any involvement in the hiring decisions for the positions.

Chen's Computer and Mouse

During her first year at OCRT, Chen complained to Nielsen that her computer was slow, that it crashed frequently, and that her mouse did not work very well. Chen requested a new computer and new mouse during the first year of her employment. Other employees had computer

malfunctions in this time. An information technology employee for Northwestern inspected Chen's computer and determined that it was sufficient for the tasks she was asked to perform. The information technology employee inspected Chen's mouse, which Chen had complained was malfunctioning, and cleaned it in 1999. Chen thought her mouse still did not work properly and bought her own mouse.

On March 10, 2001, Chen submitted a letter to Michael Powell, Northwestern's Director of Equal Employment Opportunity, Affirmative Action and Labor Relations. The letter referred Powell to a February 13, 2001 prescription from Chen's doctor for an ergonomic keyboard and trackball mouse due to her carpal tunnel syndrome. Chen asserts that she had first requested the ergonomic keyboard and trackball mouse in February. Northwestern contends Chen was not performing any computer work at that time. Northwestern purchased an ergonomic keyboard and delivered it to Chen in late April 2001 when Chen began performing computer work again. Northwestern did not ask Chen to resume substantial keyboard work until May 9, 2001.

Alleged "Young Lady" Comments

During Chen's employment in OCRT, Lindsay referred to Chen as a "young lady" on approximately three occasions. Chen informed Lindsay that she found the "young lady" comment offensive. According to information provided to Chen by Northwestern, Chen was the third oldest member of OCRT during her employment there. Lindsay was nine years younger than Chen. In a conversation with Lindsay about Chen, Schnitzer directed Lindsay not to refer to Chen as "young lady," if Chen found it offensive.

The Research Financial Analyst Position

Between September 1999 and March 2002, the Research Financial Analyst position at OCRT became available three different times. It was available in February 2000, January 2001, and March 2002. On each occasion, the position was posted on Northwestern's job posting system and made available for other employees or potential employees to apply for. Chen never applied for the Research Financial Analyst position.

Chen's Memo Regarding Other Discriminatory or Harassing Acts Against Chen

Chen sent an eight-page memo with multiple attachments, dated August 12, 2001, to Guy Miller, Vice President of Human Resources, and Thomas Schnitzer, Director of OCRT, with a subject line that read, "OCRT & HR Discrimination and Harassment vs. My Alternatives." Copies of the memo were also sent to Matthew Bowers, Melissa Durst, Sheri Lindsay, Karen McGuire, Carol J. Nielsen, Michael A. Powell, and Rita Winters. In this memo, Chen states that she "came to realize I have been discriminated and harassed by OCRT, HR and thus, the University, because of my race, Asian, Chinese American, born abroad, age, over 40, and disability, Carpal Tunnel Syndrome." She goes on the describe the experiences and incidents that led her to this realization, as outlined below, including Lindsay's "young lady" comments, Chen's workstation location, and her carpal tunnel syndrome and worker's compensation issues.

Chen states that Lindsay introduced her to a group of visitors to OCRT by saying, "Fiona does whatever we tell her to do." Lindsay also would walk out of her office to

throw trash in Chen's trash can on occasion.

In February 2000, Chen reports that Nielsen directed her to write emails as formal memoranda because English is Chen's second language. On August 3, 2000, after learning that Chen reported a work-related injury to Northwestern, Nielsen expressed concern about the Risk Management office's response instead of asking how Chen was doing. On September 6, 2000, Chen returned to work, although she was still injured. Chen states that Nielsen's first comments to her, while Nielsen ate a container of yogurt as breakfast, were that if Chen could not do her work, she would need to contact HR to discuss her alternatives.

In December 2000, Chen states Bowers told her that if she did not apply for FMLA leave, that Northwestern could cut her position to half time or terminate it entirely. She states that Melissa Durst, also of HR, told her on January 22, 2001, that if Northwestern found it an undue hardship to accommodate Chen's injury, that would call for termination.

Chen states that OCRT and Northwestern HR repeatedly told her that she needed to request Family and Medical Leave Act ("FMLA") time to cover her doctors' appointments and prescribed daily breaks. Chen states that she applied for FMLA leave three times during nine months, but that HR did not regard her as qualified because she had a work-related injury. Northwestern notes that on two occasions, Chen did not properly complete the FMLA application paperwork and thus, her application could not be processed.

Other Asian-Pacific Employees

Principal Investigators at OCRT

Dr. George Liang and Dr. Peter Lee were faculty

members and physicians at Northwestern. Both men were also principal investigators for research trials conducted in OCRT. Drs. Liang and Lee were never supervised by Dr. Thomas Schnitzer, Sheri Lindsay, or Carol Nielsen. Each OCRT research trial is financially supported by grant money from an industry sponsor. Usually, the total amount of grant money exceeds the costs that OCRT and its clinic incur in conducting the clinical trial; any excess grant money is then allocated to the principal investigator and is referred to as a "physician recovery." Nielsen is responsible for reviewing and approving a budget for each clinical trial conducted in OCRT, which includes the amount of "physician recovery," if any. Nielsen bases her decision about the amount of physician recovery to allow on a variety of factors, including study cost and revenue. The recoveries typically range between eight and twenty percent of the total budget; Nielsen tries not to let a physician recovery go below 10%. Nielsen never considers the identity fo the principal investigator in determining the amount of physician recovery to allow in a particularly clinical trial budget. Nielsen never received any complaint from Dr. Lee or Dr. Liang regarding the amount of the physician recovery set for any clinical trials that either doctor conducted at OCRT.

Temporary Employees at OCRT

Michelle Tran was a temporary employee at OCRT. Tran reported to John Sikora and Dr. Thomas Schnitzer. Dr. Schnitzer thought very highly of Tran's work. When Tran was hired, she had just finished maternity leave and was looking for part-time flexible work hours. She worked a flexible schedule at OCRT. Tran wanted to become a permanent employee once her child got older. Her supervisors and other OCRT managers discussed making Tran a permanent employee and were positive about the possibility of doing so. Tran never applied for a permanent

position. In fact, Tran left her temporary position at Northwestern because her child developed an illness, and she needed to spend more time on her child's care.

Keerana Swastikul was employed by Northwestern in the Office of Sponsored Research Programs ("OSRP") on the Evanston campus, from approximately 1990 until 1996. OSRP is a separate department from OCRT, where Chen worked, although both are under the Office of the Vice President of Research. During this time, Swastikul reported to Barbara Siegel, the head of OSRP. She then worked in the OSRP office on the Chicago campus from approximately 1996 until the end of April 2000, during which time she reported to a number of supervisors. At no time did Swastikul report to Carol Nielsen or Sheri Lindsay.

Swastikul is a native of Thailand and English is her second language. Swastikul experiences some difficulties writing in English. In 2000, Pamela Webb, one of Swastikul's supervisors in Chicago, told Swastikul that her English was not good enough and that she needed to practice her English. Another of Swastikul's supervisors, Sara Judd, frequently called Swastikul in to complain about Swastikul's written English skills.

In 1996, Swastikul complained to Northwestern's affirmative action officer, Andy Neukranz-Butler, about certain racially-motivated comments that Swastikul claimed various Northwestern employees in OSRP directed at her while she worked on the Evanston campus. Swastikul never complained to anyone at Northwestern about discrimination after she moved to the Chicago campus in 1996.

Sheri Lindsay hired Lauro Sansano as a temporary employee in OCRT in May 2000. Lindsay completed a Personal Data form indicating that Sansano was hired as a

temporary employee, which Sansano signed in Lindsay's presence on May 15, 2000. Sansano worked as a temporary employee in OCRT from May 2000 until December 2000. While he was employed in OCRT, Sansano completed and signed time sheets every two weeks that were entitled "Temporary Employee Time Sheet"; Lindsay also signed these time sheets on numerous occasions to approve Sansano's pay. Temporary employees at Northwestern may only work for 1,000 hours in a calendar year. When Sansano had worked 1,000 hours, his employment at Northwestern ended. Sansano never complained to Matt Bowers in HR about anything relating to his employment.

Other Employees' Promotion and Job Changes

Allison Johnson was hired as a Protocol Coordinator in OCRT in October 2000. In January 2002, Johnson was given additional responsibilities and was promoted to a Lead Coordinator position. Debbie Gibson began working as an employee in OCRT in February 1998. In 2001, Gibson worked as a Research Coordinator in OCRT. In January 2002, Gibson was moved to a new position as a Regulatory Coordinator. Amy Lillard was hired by Northwestern in April 2001 as a Special Projects Coordinator I. She was promoted to Special Projects Coordinator II in September 2001. In June 2002, Lillard was transferred to a Regulatory Coordinator position that had been vacated by another employee.

Chen's Discrimination Charges

On May 24, 2002, Chen filed a Charge of Discrimination (No. 210A203237) with the Equal Employment Opportunity Commission. In it, she alleged discrimination based upon race, national origin, age, disability, and retaliation. On April 5, 2003, Chen received a

Notice of Right to Sue for Chen's Charge No. 210A203237. Chen then filed her complaint in this lawsuit on June 5, 2003.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, along with any affidavits, show there is no genuine issue of fact. Such a showing entitles the moving party to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Lucas v. Chicago Transit Authority*, 367 F.3d 714, 720 (7th Cir.2004). A genuine issue of material fact exists only when a reasonable factfinder could find for the nonmoving party, based on the record as a whole. The court does not weigh the evidence and it does not make credibility determinations. Instead, the court makes all reasonable inferences in favor of the nonmoving party. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); *EEOC v. Sears, Roebuck & Co.*, 233 F.3d 432, 436 (7th Cir.2000). If a party fails to present proof on an essential element of his or her case, then all other facts become necessarily immaterial. *Ribando v. United Airlines, Inc.*, 200 F.3d 507, 509 (7th Cir.1999).

III. ANALYSIS

Any discussion of Chen's claims must begin with a discussion of Chen's evidence. Chen is proceeding *pro se* in this matter and faces the significant evidentiary barriers common to *pro se* parties. In particular, Chen has submitted several volumes of exhibits to this Court, much of which has not been authenticated or verified by anyone with personal knowledge of the information contained therein. In addition,

Chen has attached exhibits to several of the deposition transcripts submitted, and a closer look at the deposition transcripts reveals that several of these exhibits are not properly submitted, were not produced during discovery, and remain unauthenticated. Although this Court construes all evidence in the light most favorable to the nonmovant when deciding a summary judgment motion, this Court cannot consider material that is not properly before it. Even taking into consideration Chen's *pro se* status, this Court will not consider documents whose veracity cannot be determined.

A. Discrimination Claims

Under the ADEA, Title VII, or § 1981, a plaintiff may prove her employment discrimination claim using either the "direct method" or the "indirect method." *See Cerutti v. BASF Corp.*, 349 F.3d 1055, 1060, 1061 n. 4 (7th Cir.2003). Under the direct method, the plaintiff can use either direct or circumstantial evidence to show that her employer's decision to take an adverse employment action against her was motivated by an impermissible bias, such as race, age, or national origin. *Id.* at 1061. Direct evidence is evidence that, without relying on inference or presumption, proves that the employer discriminated against the plaintiff; the trier of fact must find such direct evidence believable. *Rogers v. City of Chicago*, 320 F.3d 748, 753 (7th Cir.2003). As such, courts have described direct evidence as essentially "an admission by the decision-maker that his actions were based upon the prohibited animus." *Id.* (citation omitted). The plaintiff may also prevail under the direct method of proof by weaving a net of circumstantial evidence that "allows a jury to infer intentional discrimination by the decisionmaker." *Id.; see also Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 736 (7th Cir.1994). Such a net of circumstantial evidence, however, must point "directly to a discriminatory reason for the

employer's action." *Adams v. Wal-Mart Stores, Inc.*, 324 F.3d 935, 939 (7th Cir. 2003).

The indirect method of proof is the familiar burden-shifting approach from *McDonnell-Douglas*, where plaintiff establishes her prima facie case of discrimination, defendant rebuts it, and plaintiff demonstrates that defendant's rebuttal is a mere pretext for discrimination. *Cerutti*, 349 F.3d at 1062. A plaintiff proceeding under this method must establish that (1) she is a member of a protected class (e.g., race, national origin, age); (2) she was qualified for the position (or to be retained, promoted, or rehired); (3) she suffered an adverse employment action; and (4) similarly situated employees outside of her protected class were treated more favorably by their employer. *Id.*

No matter how the plaintiff chooses to proceed, the burden remains on the plaintiff to demonstrate that the employer would not have taken the alleged adverse employment action against the plaintiff but for plaintiff's membership in a protected class. *Cerutti*, 349 F.3d at 1062.

1. Certain of Chen's Allegations Are Time-Barred

Before the merits of Chen's claims can be addressed, the Court must determine whether any of her allegations are time-barred. Under Title VII of the Civil Rights Act of 1964, a plaintiff must file a discrimination charge with the Equal Employment Opportunity Commission ("EEOC") or the Illinois Human Rights Commission within 300 days of the "alleged unlawful employment practice." 42 U.S.C. § 2000e-5(e)(1); *see also Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) (discussing charge filing requirements of Title VII). When the act complained of is a discrete retaliatory or discriminatory act, "it 'occurred' on the day it 'happened'."

Morgan, 536 U.S. at 110. The 300-day period begins to run on the day the act occurred. Acts that occurred outside the limitations period, e.g., that occurred more than 300 days prior to the triggering act, must be connected to the events that occurred within the limitations period. *Id.* at 118. A significant time lapse between the acts within the limitations period and those outside it may bar Plaintiff from seeking recovery for or relying on the acts that occurred outside the statutory period. *See Garrison v. Burke*, 165 F.3d 565, 570 (7th Cir.1999) (quoted in *Boebel v. Combined Ins. Co. of Am.*, No. 02 C 1772, 2004 WL 144135, at *3 (N.D.Ill. Jan.16, 2004)).

There are three considerations a court may use to determine whether a continuing violation exists: (1) the relatedness of the subject matter of the alleged acts or conduct; (2) the frequency of the acts or conduct complained of; and (3) their degree of permanence. *See Selan v. Kiley*, 969 F.2d 560, 565 (7th Cir.1992). Chen's complaint alleges wrongful termination, failure to promote, failure to reasonably accommodate her disability and failure to hire. With the exception of the failure to reasonably accommodate, these are all discrete acts and isolated acts. The failure to accommodate claim fails continuing violation analysis because Chen fails to provide sufficient evidence that Northwestern's denials of her accommodation requests were frequent or related. Therefore, any actions that occurred before July 28, 2001 (that date minus 300 days) are outside of the 300-day limit and no longer susceptible to judicial review. *See* 42 U.S.C. § 2000e-5(e); *Lucas v. Chicago Transit Auth.*, 367 F.3d 714, 720-21 (7th Cir.2004).

2. Wrongful Termination

a. Direct Method

Chen alleges that she was wrongfully terminated. Chen has adduced no direct evidence of discriminatory animus in her termination. She appears to seek to provide circumstantial evidence to create an inference that Northwestern had a discriminatory intent when it terminated her. To succeed, Chen must produce enough evidence to permit a reasonable finder of fact to infer that Northwestern was motivated by Chen's race, national origin, age, or disability (actual or perceived) when it terminated her. *Adams v. Wal-Mart Stores, Inc.*, 324 F.3d 935, 983-39 (7th Cir.2003). Chen would have to offer evidence showing that the person who decided to eliminate her position and terminate her, Schnitzer, was motivated by one of the discriminatory reasons she claims when he made that decision. *See Chiaramonte v. Fashion Bed Group, Inc.*, 129 F.3d 391, 396 (7th Cir.1997). Northwestern asserts that Chen does not offer any evidence of this nature because none exists. Chen attempts to prove discriminatory intent by pointing to a series of comments and decisions undertaken by people at OCRT, Northwestern HR, and other departments.[6] Chen fails to show how the decisions and incidents involving other people demonstrate that *Schnitzer* was motivated by impermissible discriminatory animus. In fact, in her discussion of the experience of certain other Asian-Pacific employees, she discusses someone who worked in a different department, was supervised by difference people, and had no experience with Schnitzer, the person who decided to terminate Chen. As such, Chen fails to adduce direct proof of discriminatory intent in her wrongful discharge claim.

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[6] Northwestern notes, correctly, that the assertions Chen makes about discriminatory conduct by other employees at Northwestern are largely unsupported. Moreover, Northwestern notes that Chen's brief does not cite to evidence or law tending to support her assertions.

b. Indirect Method

Chen asserts that she can make her prima facie case of discrimination through indirect evidence. She points to the United States Supreme Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003), as support for her position. *Desert Palace* holds that a plaintiff is not required to present direct evidence of discrimination under Title VII in order to obtain a mixed-motive jury instruction. *Id.* at 92. *Desert Palace* does not, however, alter the requirement that a plaintiff provide *some* evidence of a discriminatory motive. *Id.* at 99-100. *Desert Palace* is unhelpful here, because Chen is unable to produce evidence to support a prima facie claim.

Chen argues that she is a member of a protected class as a woman of Asian-Pacific origin who was forty-four years old when she was hired. Pl.'s Resp. Br. at 11. She asserts that she was qualified for the position because she has a doctoral degree and "long-term teaching and working experience in the area." Pl.'s Resp. Br. at 13. Chen states that she suffered an adverse employment action when she was terminated in November 2001.

Northwestern does not dispute that Chen is a member of a protected class on the basis of national origin, race, and age. In addition, Northwestern does not dispute that Chen was qualified for the position of Technical Software Specialist, which both parties state was created especially for Chen. Pl.'s Compl., Attachment to Charge of Discrimination, at ¶ III.4 ("My position of Technical Software Specialist was created for me."); Def.'s L.R. 56.1 Stmt at ¶ 7 ("The Technical Software Specialist position was created especially for Chen."). Finally, Northwestern does not dispute that Chen was qualified for the TSS position.

Chen's prima facie case fails because she is unable to establish that she was treated differently from similarly situated employees who were not members of a protected class. To do this, she would have to provide evidence that there was an employee who was not a member of her race, age, or national origin class in a TSS or similar position who was treated differently from her. The uniqueness of Chen's position is particularly problematic in this regard. Both parties concede that the position was created especially for Chen. Northwestern asserts that the TSS position in OCRT has not existed since Chen was laid off. There is no evidence that there were other TSS positions or employees in comparable positions in OCRT at any time during Chen's employment. Chen is unable to show that there were similarly situated employees who were not members of her protected class(es) and who were treated differently from her. Thus, her prima facie case fails. Summary judgment is therefore appropriate on Chen's wrongful termination claim.

3. Failure to Promote

Chen alleges that Northwestern discriminated against her by failing to promote her into the Research Financial Analyst position in OCRT in 2000 and 2001. Northwestern contends that Chen is time-barred from pursuing claims relating to events that occurred prior to July 28, 2001. Moreover, Northwestern contends that Chen never applied for the position. Chen asserts that she did not know that the Research Financial Analyst position was open. She asserts that Northwestern prevented her from knowing about the position opening, but the citation to the record she provides does not support her assertion. Furthermore, Chen acknowledges that she "never saw the job opening" announcement. Northwestern asserts that the position was posted on the university's job posting system all three times

it became available and provided copies of the job requisition for all three openings.[7] Def.'s L.R. 56.1 Stmt at ¶ 154-55; Bowers Dep. Ex. G. In addition, Chen has failed to provide evidence showing that she was qualified for the Research Financial Analyst position. *Grayson v. City of Chicago*, 317 F.3d 745, 748 (7th Cir.2003) (plaintiff must prove both that she applied for and that she was qualified for the position in question). Rather, Chen has provided a copy of her resume and asserted that, in her opinion, based on her advanced degree and her prior work experiences, she was qualified for the position. Even drawing all reasonable inferences in favor of the non-movant, this Court is unable to rely on unsubstantiated statements or assertions by a party to defeat a summary judgment motion. Thus, because Chen never applied for the Research Financial Analyst position, summary judgment for the defendant is appropriate on her failure to promote claim.

4. Failure to Hire

A plaintiff alleging a failure to hire claim must establish that (1) she belongs to a protected group; (2) she applied for and was qualified for a job for which the employer was seeking applicants; (3) she was rejected, despite her qualifications; and (4) the employer hired someone outside the protected group. *Hughes v. Derwinski*, 967 F.2d 1168, 1171 (7th Cir.1992). Chen fails to make her prima facie case, as discussed below.

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[7] Chen disputes that the position was posted on the university's job posting system and contends that the copies of the job requisition form show only that the position was filled each of the three times it was open. However, a closer inspection of the requisition form reveals that the form reports not only the date the position was filled or closed, but also the date the requisition was authorized. In each case, there is a difference of at least ten days between requisition and closing date. Bowers Dep., Ex. G.

a. The Research Financial Analyst Position

Chen also asserts that Northwestern failed to hire her into the Research Financial Analyst position in 2002. The difficulty with Chen's failure to hire claim is identical to her failure to promote claim, that is, she did not actually apply for the position in question.

b. Post-Layoff Job Applications

After her termination, Chen applied for five different positions at Northwestern in December 2001 and May 2002. Chen concedes that each application was processed according to Northwestern's practice and that she was not selected for any of the positions. None of the positions was in OCRT. None of Chen's former supervisors in OCRT was involved in the hiring decisions for these positions. Chen has provided no contrary evidence on any of these issues.

For these reasons, the defendant is entitled to summary judgment on Chen's failure to hire claim.

5. Retaliation Claim

Chen alleges that Northwestern impermissibly retaliated against her in violation of Title VII, the ADEA, § 1981, and the ADA. Under these statutes, unlawful retaliation occurs when an employee suffers an adverse employment action because he or she opposed impermissible workplace discrimination. *Rogers v. City of Chicago*, 320 F.3d 748, 755 (7th Cir.2003).

Northwestern argues that Chen's retaliation claim is improper because she did not raise it in her complaint and a "plaintiff may not amend [her] complaint through arguments

in [her] brief in opposition to a motion for summary judgment." *Garza v. City of Chicago*, No., 99 C 391, 2000 WL 283910, at *4 (N.D.Ill. Mar.14, 2000). Northwestern further states that Chen did not include retaliation allegations in the five-page, single-spaced attachment to her complaint which made allegations about a litany of issues. This is not entirely accurate. Paragraph III.1 of Chen's attachment to her complaint sets forth allegations that clearly support a retaliation charge. Several other paragraphs also set forth allegations consistent with a retaliation claim, although in somewhat incoherent fashion. Moreover, Chen attached her EEOC right to sue letter and EEOC Charge of Discrimination to her complaint. On her Charge of Discrimination, she clearly checked the box for retaliation discrimination. As such, and bearing in mind Chen's *pro se* status, this Court will deny Northwestern's request to bar Chen's retaliation claim as improperly raised.

A plaintiff can prove retaliation discrimination using either the direct or the indirect methods described above. *Rogers v. City of Chicago*, 320 F.3d 748, 754 (7th Cir.2003). A plaintiff may proceed under the direct method by adducing either direct or circumstantial evidence that permits a fact finder to infer discrimination. *Rogers*, 320 F.3d at 754. Circumstantial evidence can include suspicious timing, ambiguous statements, evidence that the employer treated similarly situated employees differently, or evidence that the employee was qualified but was subject to differential treatment for which the employer's reason is mere pretext. *Gorence v. Eagle Food Centers, Inc.*, 272 F.3d 759, 762 (7th Cir.2001).

Chen puts forth no direct evidence of retaliation. She does, however, put forth some circumstantial evidence, namely the timing of her termination. Chen asserts that she was targeted for termination three months after she

submitted an eight-page memo to Guy Miller, Associate Vice President of Human Resources, and Thomas Schnitzer, Director of OCRT, detailing that she "realized that [she] ha[d] been harassed and discriminated [against]." This memo purported to list the ways in which various OCRT supervisors and employees had discriminated against Chen; it was copied to seven people in OCRT and Northwestern HR. Chen asserts that the three month gap between her memo and her termination "provides ground" for her retaliation claim. The Seventh Circuit, however, has stated that "mere temporal proximity between the filing of the charge of discrimination and the action alleged to have been taken in retaliation for that filing will rarely be sufficient in and of itself to create a triable issue." *Stone v. City of Indianapolis Pub. Utils. Div.*, 281 F.3d 640, 644 (7th Cir.2002). Chen presents no other circumstantial evidence as grounds for her retaliation claim. This Court finds that Chen presents no evidence to support the direct method of proving retaliation.

Chen can also proceed via the indirect method of proving retaliation. This method is similar to the *McDonnell-Douglas* burden-shifting approach, but has been clarified by the Seventh Circuit in *Stone v. City of Indianapolis Public Utilities Division* , 281 F.3d 640 (7th Cir.2002). Under the indirect method articulated in *Stone*, Chen must establish a prima facie case of discrimination. One of the required elements of her prima facie case is that "only she, 'and not any otherwise similarly situated employee who did not complain, was ... subjected to an adverse employment action." ' *Rogers*, 320 F.3d at 755 (quoting *Stone*, 281 F.3d at 642)). Chen provides no discernible evidence of whether any other employee at OCRT complained of discriminatory treatment. However, even if she had, she fails to overcome Northwestern's legitimate, nondiscriminatory reason for its actions and

therefore, fails to defeat summary judgment.

Assuming that Chen had been able to make out a prima facie case, the burden of production would shift to Northwestern to provide a legitimate, nondiscriminatory reason for terminating Chen. Northwestern states that Schnitzer eliminated three positions in OCRT as part of an effort to meet a requirement that he eliminate $200,000 from OCRT's budget when OCRT was moved into the Northwestern University Medical School. Dr. Robert Rosa, the Executive Associate Dean for Clinical Affairs of Northwestern's Medical School, wrote a letter to Schnitzer on October 26, 2001, stating "I am instructing you to decrease the projected expenses of the OCRT for budget year 2001-2002 by approximately $200,000." Rosa indicated that this budget decrease was "necessitated by the most recent estimates of projected revenues for the OCRT." To meet this mandate, Schnitzer and his management staff decided to eliminate three support-staff positions that were not directly providing services to principal investigators. These positions included the TSS position Chen held. Chen admits that Rosa directed Schnitzer to cut OCRT's budget by $200,000. In addition, Chen is unable to produce evidence showing that Northwestern's budgetary constraint was mere pretext for discriminatory retaliation.

Because Chen is unable to rebut Northwestern's nondiscriminatory reason, summary judgment for the defendant on Chen's retaliation claim is appropriate.

6. Failure to Reasonably Accommodate-ADA claim

Chen alleges that Northwestern discriminated against her on the basis of disability in May 2001 when it refused her request to work no more than two hours per day on her computer and keyboard; and again in November 2001, when

it refused to allow her typing, copying, and computer work to only three hours per day in the Program Assistant I position and, instead, terminated her. Northwestern contends that Chen's first accommodation request is time-barred because it occurred prior to July 28, 2001; it further contends that her second accommodation request was unreasonable and that, in any event, it terminated her because of university budgetary constraints that necessitated eliminating her position.

The ADA prohibits certain employers from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (2000). It is undisputed that Northwestern University is an employer subject to the ADA. It is less clear whether Chen is an "individual with a disability" for the purposes of the statute.[8] However, when deciding a summary judgment motion, this Court will make all reasonable inferences in favor of the non-moving party. Therefore, this Court will

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[8] Chen has taken conflicting positions about whether she is an individual with a disability over the course of her employment with Northwestern and the pendency of this litigation. During her pre-termination communications with Northwestern's human resources and risk management personnel, Chen both requested accommodation of her disability under the ADA and denied that she was disabled and stated that her situation was not covered by the ADA. (Def.'s L.R. 56.1 Stmt, at ¶ ¶ 70, 76-84). Northwestern agreed that the ADA did not apply to Chen. (Def.'s L.R. 56.1 Stmt, at ¶ 79-80). However, Northwestern and Chen continued to discuss modified work assignments that would not aggravate her hand and wrist pain. (Def.'s L.R. 56.1 Stmt, at 83).

treat Plaintiff as an individual with a disability for the purpose of deciding this motion.

To prove that she suffered disability discrimination under the ADA, Chen may use either the direct or the indirect method of proof. As with Title VII claims, there are two acceptable forms of evidence under the direct method: direct evidence and circumstantial evidence. Direct evidence is essentially an admission by the employer that its decisions were based on discriminatory animus. *Rogers v. City of Chicago*, 320 F.3d 748, 753 (7th Cir.2003). Circumstantial evidence, by contrast, permits a fact-finder "to infer intentional discrimination by the decision-maker." *Id.*

Chen may also choose to proceed under the indirect method, which requires her to establish a prima facie case of discrimination. To make her prima facie case, Chen must show that (1) she was disabled under the ADA; (2) she is qualified to perform the essential functions of her job with or without reasonable accommodation; and (3) she has suffered from an adverse employment action because of her disability. *Buie v. Quad/Graphics, Inc.*, 366 F.3d 496, 503 (7th Cir.2004) (citation omitted). If Chen establishes a prima facie case of disability discrimination, then the burden of production shifts to Northwestern to articulate a legitimate, nondiscriminatory reason for its adverse employment action against Chen. *Id.*; *Dvorak v. Mostardi Platt, Inc.*, 289 F.3d 479, 485 (7th Cir.2002). At that point, the burden would shift back to Chen; she would be required to show by a preponderance of the evidence that Northwestern's proffered nondiscriminatory reason is a mere pretext for intentional disability discrimination. *Buie*, 366 F.3d at 503.

A plaintiff must show that she was qualified, with or without accommodation, to perform the essential functions of her job at the time that the employer took the allegedly

discriminatory action. *Ammons v. Aramark Uniform Servs., Inc.*, 368 F.3d 809, 818 (7th Cir.2004); *Ross v. Indiana State Teacher's Ass'n Ins. Trust*, 159 F.3d 1001, 1013 (7th Cir.1998). When determining what constitutes an essential job function, the court will consider "job description, employer's opinion, amount of time spent performing the function, consequences for not requiring the individual to perform the duty, and past and current work experiences." *Emerson v. Northern States Power Co.*, 256 F.3d 506, 512-13 (7th Cir.2001).

a. Direct Method of Proving Disability Discrimination

Chen has no direct evidence of disability discrimination. She must therefore proceed via circumstantial evidence or via the familiar *McDonnell-Douglas* burden-shifting method. *Cerutti v. BASF Corp.*, 349 F.3d 1055, 101062 (7th Cir.2003). Chen seeks to present circumstantial evidence of disability discrimination. Specifically, she provides three-and-a-half pages of numbered paragraphs which purport to demonstrate that a reasonable finder of fact could infer discriminatory intent from the university's actions. Much of the "evidence" presented in these pages of Chen's brief is questionable, unsubstantiated, or inadmissible hearsay. Moreover, Chen cites no legal authority for her assertion that this evidence constitutes sufficient circumstantial evidence to establish an inference of discrimination. The remainder address Chen's claims that she was unfairly disciplined, prevented from learning of job openings, or denied accommodation requests. Beyond the somewhat circular nature of some of these arguments, e.g., "I was not accommodated because I was not accommodated," Chen's assertions have been contradicted by the record or are unsupported. Chen is unable to proceed under the direct method.

b. Indirect Method of Proving Disability Discrimination

Chen must use the indirect, burden-shifting method to establish her prima facie case of disability discrimination. The elements of the prima facie case are identical to those discussed above. Chen is a member of a protected class on the basis of her age, race, and national origin. She further asserts that she is a member of a protected class on the basis of her disability, specifically carpal tunnel syndrome. As previously noted, this Court will treat Chen as disabled for the limited purpose of this summary judgment motion only. Chen asserts that she was qualified for the position because of her advanced educational achievement and extensive resume. Chen also asserts that she suffered adverse employment actions, including the elimination of her TSS position, Northwestern's refusal to accommodate her proposed restrictions on the Program Assistant I position, and her ultimate termination. The fourth element of her prima facie case is fatal to Chen's argument again, because Chen is unable to produce evidence establishing that she was treated differently from similarly situated employees who were not members of her protected class.

Northwestern contends that Chen was unable to perform the essential functions of her position, with or without reasonable accommodation. This is the question that this Court must answer in Chen's case. The factors that a court takes into consideration when determining what constitutes an essential job function include job description, employer's opinion, amount of time spent on the function in question, consequences of not requiring the employee to perform the function, and past and current work experiences. *Ammons v. Aramark Uniform Servs., Inc.*, 368 F.3d 809, 818 (7th Cir.2004) (quoting *Emerson v. Northern States Power Co.*, 256 F.3d 506, 512-13 (7th Cir.2001)).

(1) Chen's May 2001 Accommodation Request

Northwestern contends that this accommodation request is time-barred. Even if it was timely, Northwestern asserts that Chen's May 2001 request to limit her computer work to two hours per day was unreasonable; The TSS position, Northwestern asserts, was a "quintessential computer job." Def.'s Br. at 13. Moreover, Chen admits that she worked on her computer for up to 6-8 hours per day for months at a time.[9] Chen's job functions included the design, implementation, and maintenance of various databases; creation of materials and publications to promote OCRT within Northwestern University; provision of technical assistance and support to OCRT staff; and coordination of financial activities to enhance departmental reporting, all of which was largely done on the computer. The initial job description for the TSS position estimated that at least 30% of the position's duties would involve computer database work and another 30% would involve technical assistance to OCRT staff. Even taking a conservative view and assuming that only 30% of the position's duties involved computer work, the position still required over two-and-a-half hours of computer work per day. Between August and November 2000, Chen's supervisors in OCRT allowed her to perform

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[9] Chen asserts that she was able to perform her job functions because when she was not working on the computer, she was assisting colleagues in building databases. For evidentiary support, she cites a memo that she wrote to Michael Powell on March 10, 2001. This is insufficient because it is a self-serving statement contained in a document drafted by the plaintiff in this case. There is no evidence that any of Chen's supervisors agreed with Chen's interpretation of her job performance and ample evidence that they disagreed.

non-computer tasks while they waited for her hands to improve. These alternate duties were not part of Chen's job duties; moreover, there was a limited supply of alternate duties in the office. Chen estimates that she performed zero hours of computer work per day from August 2, 2000 until April 26, 2001.

Northwestern asserts that Chen's accommodation request effectively required it to create a new job for Chen or make light duty work available indefinitely. The Seventh Circuit has stated that "a significant change in the essential functions of [plaintiff's] job" do not amount to a reasonable accommodation. *Ammons*, 368 F.3d at 819. Chen's suggested accommodations would amount to limiting her work to two hours out of an eight-hour work day. The other accommodation she suggested, that she sit with OCRT employees and help them build and maintain the databases they used without using a computer herself, would amount to using two employees' time to perform one employee's job function. These are not accommodations that would allow Chen to perform the essential functions of her position. "An employer is not obligated to change the essential functions of a job to accommodate an employee." *Emerson v. Northern States Power Co.*, 256 F.3d 506, 514 (7th Cir.2001). Chen's May 2001 accommodation request was unreasonable for the purposes of the ADA and therefore, Chen was not a "qualified individual" under the Act.

(2) Chen's November 2001 Accommodation Request

Chen alleges that Northwestern failed to reasonably accommodate her in November 2001, when it denied her request to take the Program Assistant 1 position on the condition that she perform no more than three hours of copying, typing, or similar tasks per day. Northwestern

contends that Chen's condition rendered her unable to perform an essential function of the Program Assistant 1 position and that her proposed accommodation was unreasonable.

Northwestern asserts that the Program Assistant 1 position was primarily clerical and required a large amount of typing, copying, and other computer work. Working more than three hours per day on the computer was an essential function of the job, according to Northwestern. Chen disputes this assertion and argues that Northwestern updated the Program Assistant 1 position description before offering her the position as a "bump" option when the TSS position was terminated. The inference appears to be that Northwestern updated the position description in order to expressly disqualify Chen from being able to fill the position. Chen provides only her own inferences and asusmptions to support this assertion, namely that Matt Bowers in HR emailed Schnitzer, stating that OCRT supervisors were updating position descriptions to be used in layoff letters. The supervisor who updated the Program Assistant 1 description stated in her deposition, however, that she did not know the updated description would be used in the layoff letters. This tends to undercut Chen's apparent argument that Northwestern deliberately updated the description in order to eliminate Chen. Another reasonable inference is that the job descriptions were revised to reflect Schnitzer's restructing plans for OCRT in response to the budget reduction mandate.

Courts do not second-guess an employer's judgment as to what constitutes an essential function of a job. *Peters v. City of Mauston*, 311 F.3d 835, 845 (7 th Cir.2002) (citing *DePaoli v. Abbott Labs.*, 140 F.3d 668, 674 (7th Cir.1998)). In addition, Chen's request that she be permitted to perform no more than three hours of copying, typing, and other

computer tasks per day was not a reasonable accommodation. For these reasons, Chen was not "qualified" under the ADA because she could not perform the essential functions of the Program Assistant I position with or without a reasonable accommodation.

Summary judgment is appropriate for the defendant on Chen's failure to reasonably accommodate claims.

Conclusion

For the foregoing reasons, summary judgment is granted to the defendant on all of plaintiff's claims. All other motions are moot and terminated. This case is closed.

Enter:

/s/David H. Coar

David H. Coar
United States District Judge

Dated: February 17, 2005

APPENDIX C – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING REHEARING AND REHEARING EN BANC JANUARY 31, 2006

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

January 31, 2006

No. 05-1744

D.C. No. 03-C-3928
Northern District of Illinois, Eastern Division

FIONA FENG CHEN,

Petitioner,

v.

NORTHWESTERN UNIVERSITY,

Respondent.

Before

Hon. Richard A. Posner, Circuit Judge

Hon. Ann Claire Williams, Circuit Judge

Hon. Diane Sykes, Circuit Judge

ORDER

On Consideration of the petition for rehearing and petition for rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc[1] and all of the judges on the original penal have voted to deny hearing. It is therefore ordered that the petition for rehearing and petition for rehearing en banc is DENIED.

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[1] Chief Judge Flaum did not participate in the consideration of this petition for rehearing.

APPENDIX D- STATUTORY PROVISIONS

Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352), as amended

UNLAWFUL EMPLOYMENT PRACTICES

SEC. 2000e-2. *[Section 703]*

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to
discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member

thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

The Age Discrimination in Employment Act of 1967
29 U.S.C. § 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified,

assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

The Americans with Disabilities Act of 1990

DISCRIMINATION

SEC. 12112. *[Section 102]*

(a) General rule. - No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.